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# Supreme Court of the United States

OCTOBER TERM, 1946

No. 415

FOREMAN'S ASSOCIATION OF AMERICA,
Petitioner,
vs.
EDWARD G. BUDD MANUFACTURING COMPANY
and
NATIONAL LABOR RELATIONS BOARD,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals, Sixth Circuit

## BRIEF FOR EDWARD G. BUDD MANUFACTURING COMPANY IN OPPOSITION


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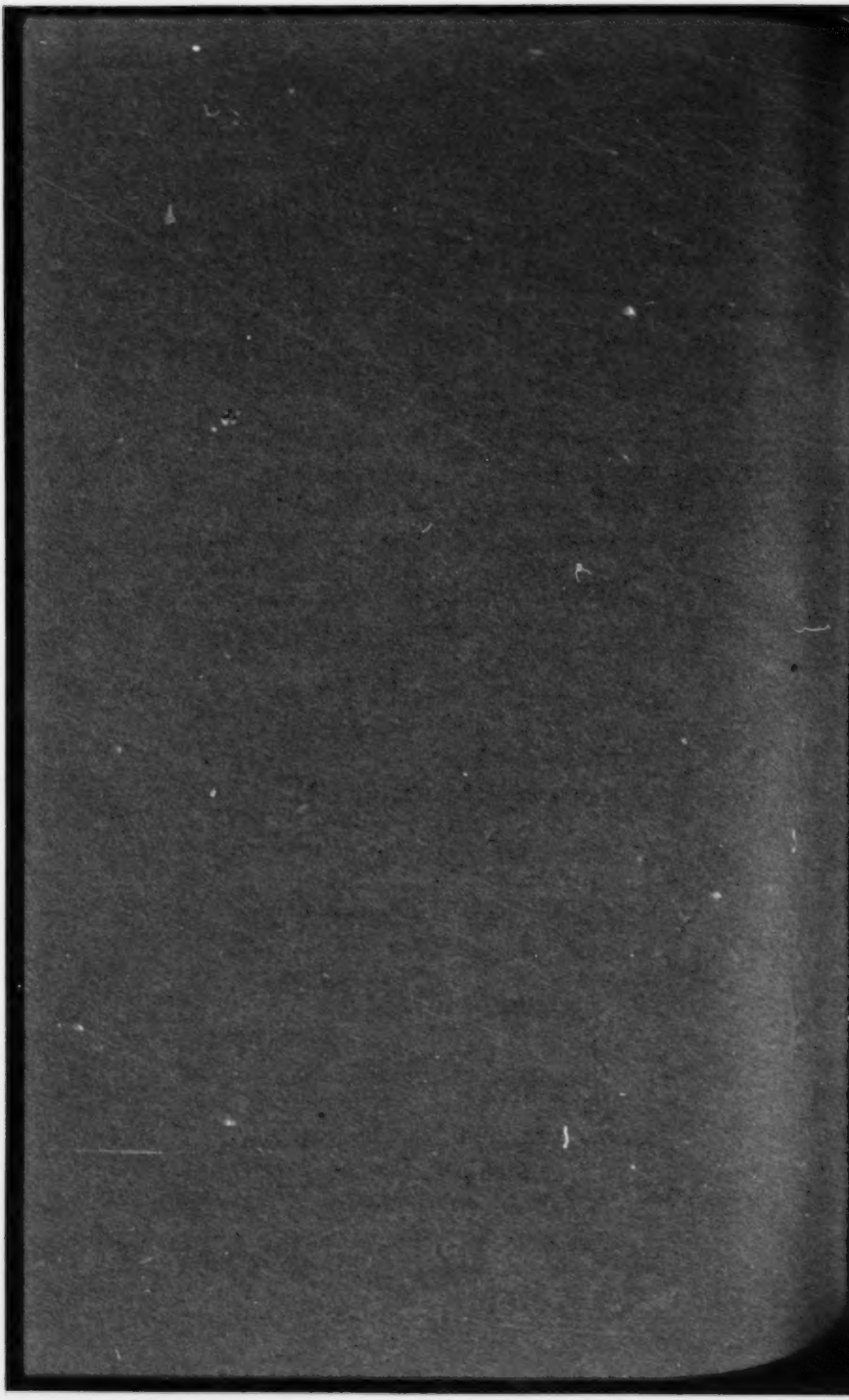


## INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Statement of the Case | 3 |
| Argument | 4 |
| I. The decision below gives proper effect to applicable decisions of this Court | 4 |
| A. The claim of the Association that Sections 2 (3), 2 (11) and 14 (a) of the Labor Management Relations Act, 1947, deny due process because they deprive supervisors "of all existing remedies" | 5 |
| (1) States under the 1935 N. L. R. A. had no jurisdiction over supervisors under that Act | 6 |
| (2) Supervisors under the 1935 N. L. R. A. did not have the right to initiate proceedings in the United States courts | 7 |
| (3) The Federal Constitution does not give employees the right to organize and to select representatives for collective bargaining | 8 |
| (4) The right to organize and to select representatives is not disturbed by the 1947 Act | 9 |
| (5) The Federal Constitution does not require an employer to bargain collectively with his employees | 10 |
| (6) The Railway Labor Act cases relied on by the Association are not in point | 12 |

Page

B. The claim of the Association that Sections 2 (3), 2 (11) and 14 (a) of the 1947 Act deny due process because they are based on an arbitrary classification ..... 15

1. Exclusions of employers and employees in the 1935 and 1947 Acts ..... 15

2. Court of Appeals' conclusion that exclusion of supervisors is not arbitrary is in accord with the holdings of this Court ..... 17

(a) Congressional history ..... 19

(b) Exemptions in other federal Acts held valid ..... 22

(c) Exclusions and "intrastate employees" ..... 23

(d) Truax v. Corrigan not in point... 24

(e) N. L. R. A. created public and not private rights ..... 25

C. Paragraphs 1(a) and (b) of the Board's order ..... 26

II. The decision below does not involve a question of general importance which has not been, but should be settled by this Court..... 26

III. Conclusion ..... 27

## CASES CITED


| | Page |
|---|---|
| Amalgamated Utilities Workers v. Consolidated Edison Co. of New York, 309 U. S. 261 | 8, 11, 25 |
| American Federation of Labor v. N. L. R. B., 308 U. S. 401 | 7 |
| Bethlehem Steel Co. v. New York Labor Relations Board, 330 U. S. 767 | 6, 14 |
| Carmichael v. Southern Coal & Coke Co., 301 U. S. 495 | 17, 22 |
| Charles C. Stewartt Machine Co. v. Davis, 301 U. S. 548 | 17, 23 |
| Edward G. Budd Mfg. Co. v. N. L. R. B., 332 U. S. 840 | 2 |
| Foreman's Assoc. of America v. L. A. Young Spring & Wire Corp., 163 F. 2d 905, 333 U. S. 837 | 11 |
| Forsyth v. Hammond, 166 U. S. 506 | 26 |
| Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U. S. 251 | 26 |
| Helvering v. Davis, 301 U. S. 619 | 17, 23 |
| L. A. Young Spring & Wire Corp. v. N. L. R. B., 163 F. 2d 905 | 26 |
| McCulloch v. Maryland, 4 Wheat. 316 | 17, 23 |
| Mabee v. White Plains Publishing Co., 327 U. S. 178 | 22 |
| Magnum Import Co. v. Coty, 262 U. S. 159 | 4 |
| Medo Photo Supply Corp. v. N. L. R. B., 321 U. S. 678 | 10 |
| Middleton v. Texas Power & Light Co., 249 U. S. 152 | 25 |
| Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 | 7 |
| N L. R. B. v. Columbia Enameling & Stamping Co., 306 U. S. 292 | 10 |
| N. L. R. B. v. Edward G. Budd Mfg. Co., 162 F. 2d 461 | 1 |
| N. L. R. B. v. Edward G. Budd Mfg. Co., 169 F. 2d 571 | 2 |
| N. L. R. B. v. International Brotherhood of Electrical Workers, 308 U. S. 413 | 7 |

Page

N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1 ..... 8
N. L. R. B. v. Pa. Greyhound Lines, Inc., 303 U. S. 261 8
N. L. R. B. v. Thompson Products, Inc., 130 F. 2d 363 25
National Council v. Sealy, 152 F. 2d 500..... 13
National Licorice Co. v. N. L. R. B., 309 U. S. 350.... 11, 25
National Maritime Union of America v. Herzog, 78 F. Supp. 146 ..... 11
New York Central R. Co. v. White, 243 U. S. 188.... 25
Newport News Shipbuilding, etc., Co. v. Schauffler, 303 U. S. 54..... 7
Packard Motor Car Co. v. N. L. R. B., 330 U. S. 485 .....18, 19, 23
Patterson v. Colorado, 205 U. S. 454..... 14
Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177..... 11, 25
Texas & N. O. R. Co. v. Brotherhood, 281 U. S. 548.. 12
Truax v. Corrigan, 257 U. S. 312..... 24
Virginia Ry. Co. v. System Federation No. 40, 300 U. S. 515..... 13
Wickard v. Filburn, 317 U. S. 111..... 24

## STATUTES CITED

Fair Labor Standards Act, 29 U. S. C., Sections 201, 213 ..... 18, 24
Federal Insurance Contributions Act, 26 U. S. C., Sections 1400, 1426..... 18
Judicial Code, Section 240, 28 U. S. C., Section 1254 2
Section 262, 28 U. S. C., Section 1651 2
Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., 1947 Cum. 151..... 2, 4
Section 2 (2)..... 16
Section 2 (3).....5, 9, 15, 16

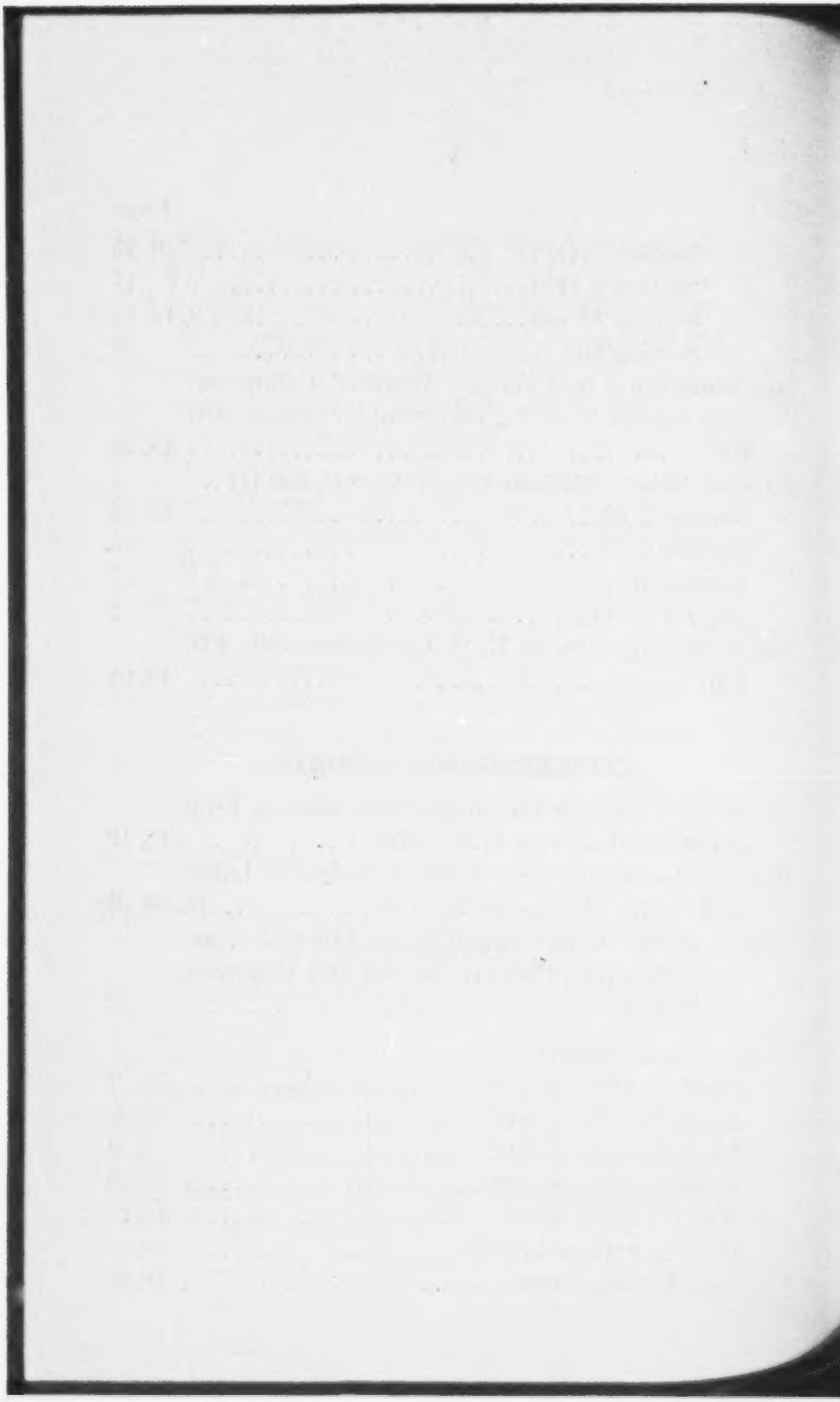
Page

Section 2 (11) ..... 5, 9, 15
Section 2 (12) ..... 17
Section 14 (a) ..... 5, 6, 9, 14, 15
Section 401 ..... 22
Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., 1947 Suppl., Sections 901, 902 ..... 18, 24
National Labor Relations Act, 29 U. S. C. 160 (f) ... 2
Section 2 (2) ..... 15, 24
Section 2 (3) ..... 16
Section 10 ..... 7
Section 10 (f) ..... 2
Social Security Act, 42 U. S. C., Sections 301, 409, 1107 ..... 18, 24

## CONGRESSIONAL REPORTS

Report (No. 245) by the House Committee on Education and Labor on H. R. 3020 ..... 18, 19
Report (No. 105) of the Senate Committee on Labor and Public Welfare on S. 1126 ..... 18, 20, 25
Report of the Joint Committee on Labor-Management Relations (Report No. 986 80th Congress, 2d Session) ..... 22

Congressional Record:
April 15, 1947, p. 3533 ..... 18, 21
April 15, 1947, p. 3556 ..... 21
April 23, 1947, p. 3952 ..... 18, 21
April 28, 1947, p. 4260 ..... 18, 21
May 1, 1947, p. 4490 ..... 18, 21
May 12, 1947, p. 5146 ..... 18, 22
June 6, 1947, p. 6660 ..... 18, 22



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### OPINIONS BELOW

The findings of fact, conclusions of law, and the order of the National Labor Relations Board (R. 53-58, 31-47) are reported in 65 N. L. R. B. 612.

The first decree of the court below, entered June 3, 1947, appears at R. 321 and is reported at 162 F. 2nd 461.

Upon petition of the Company, the Supreme Court granted its writ of certiorari "limited to the question of the validity of that part of the order of the National Labor Relations Board which directs the petitioner to cease and desist from discouraging membership in the Foreman's Association of America," vacated the decree of the lower court in that respect, and remanded the cause to the lower court "for consideration of the effect of the Labor Management Relations Act of 1947, 61 Stat. 136, on the question to which the grant of certiorari is directed." 332 U. S. 840, (The Foreman's Association of America was allowed to intervene by this Court upon the granting of the writ of certiorari.)

The lower court entered its opinion on remand on August 13, 1948. It appears beginning at R. 321 and is reported in 169 F. 2d 571.

## JURISDICTION

A copy of the instant petition for certiorari was served on counsel for the Company on November 23, 1948.

Petitioner avers that it invokes the jurisdiction of this Court "under Section 240 of the Judicial Code, 28 U. S. C., Section 1254, and Section 262 of the Judicial Code, 28 U. S. C., Section 1651, and under Section 10 (f) of the National Labor Relations Act, 29 U. S. C. 160 (f)."

## STATEMENT OF THE CASE

The Company accepts the facts set forth in "Statement of Matters Involved" in the Association's petition, beginning at page 4. But there should be added the fact that immediately after this Court issued its writ of certiorari, and in accord therewith, the Company complied with that portion of the Board's order requiring the reinstatement of one employee with back pay. Also, that the Board filed a brief on remand, and argued orally, that the 1947 amendments to the National Labor Relations Act were constitutional and that the effect of this Court's order on remand was to vacate "that portion of the decree of this Court which enforces both the cease and desist provisions of the Board's order (paragraphs 1 (a) and 1 (b)" (R. 55). (Board's Brief on Remand, p. 3-6.)

## ARGUMENT

The petition of the Association and its brief are aimed at the proposition that the 1947 amendments of the National Labor Relations Act have deprived supervisors of remedies to force employers to bargain collectively with them.

Petitioner suggests "the holding of the court below that the deprivation of all such remedies is constitutionally valid raises a federal question of general importance relating to the construction and application of the Constitution and federal statutes, which * * * does not give proper effect to applicable decisions of this Court and which has not been but should be, in the public interest, settled by this Court" (p. 9 of its Brief).

But what petitioner has in reality done in its brief is to repeat the arguments it urged in the lower court, overlooking the admonition of Chief Justice Taft, speaking for the Court in *Magnum Import Co. v. Coty,* 262 U. S. 159, 163, that "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

### I.

### THE DECISION BELOW GIVES PROPER EFFECT TO APPLICABLE DECISIONS OF THIS COURT

The petitioner urges: (A) That Sections 2 (3), 2 (11) and 14 (a) of Section 101 of the amendments to the National Labor Relations Act (contained in the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., 1947 Cum., Sections 152 (3), 152 (11) and 164 (a)), deny due process of law to petitioner and to the supervisory

employees it represents for the reason that the sections deprive supervisors "of all existing remedies in all federal agencies, including the district courts, and in all state and local agencies, including the State Labor Relations Boards, for the redress of employer violations of Constitutional rights which neither Congress nor the courts have power to abridge or destroy, and no real opportunity exists elsewhere for the protection of those rights" (p. 8 of the Petition). (B) Further, that these sections of the amended act deny due process because they "are based upon an arbitrary classification which bears no reasonable relation to the purposes of the legislation" (pp. 17, 18 of the Petition). (C) The sections, being unconstitutional, paragraphs 1 (a) and (b) of the Board's order (R. 55) should be enforced (pp. 7, 24 of the Petition).

We reply to these *seriatim*.

**A. The claim of the Association that Sections 2 (3), 2 (11) and 14 (a) of the Amended Act deny it, and the supervisory employees whom it represents, due process of law because the sections deprive supervisors "of all existing remedies in all federal agencies, including the district courts, and in all state and local agencies, including the State Labor Relations Boards, for the redress of employer violations of Constitutional rights which neither Congress nor the courts have power to abridge or destroy, and no real opportunity exists elsewhere for the protection of those rights."**

Section 2 (3) of the amended Act, in defining the term "employee," excludes supervisors from the coverage of the Act. Section 2 (11) defines the term "supervisor." Section 14 (a) provides in part that nothing in the Act "shall prohibit any individual employed as a supervisor

from becoming or remaining a member of a labor organization * * *." The Association is not complaining about that portion of Section 14 (a). Subsection (a) then continues, stating that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

It is the latter portion of this subsection to which the Association objects in the first portion of its argument.

**(1) States under the N. L. R. A. had no jurisdiction over supervisors under that Act.**

As far as that part of Section 14 (a) is concerned which provides that an employer subject to the Act is not required to recognize supervisors as employees under any state statute, for the purpose of collective bargaining, it should be noted that the language is directed only to employers under the Act and that such an employer is not prohibited from bargaining with supervisors under either the federal or a state statute if the employer so desires. But, more important, is the fact that under the National Labor Relations Act, prior to amendment, supervisors covered by the Act did not have recourse to any "local" law if the employer objected. The jurisdiction of the National Labor Relations Board over supervisors was held to be exclusive. *Bethlehem Steel Co. v. New York Labor Relations Board,* 330 U. S. 767.

So that the lower court's decision is in accord with this Court's holding and the amendment contained in the latter portion of Section 14 (a), as far as state statutes are concerned, only spells out the law as it existed prior to the amendment.

**(2) Supervisors under the 1935 N. L. R. A. did not have the right to initiate proceedings in the United States courts.**

As to the Association's further claim (p. 8 of its brief) that the effect of taking supervisors out from under the Act is to deprive them of the right to use the United States courts to enforce collective bargaining, the lower court applied the law as enunciated by this Court.

Supervisors under the 1935 Act did not have that right, as interpreted by this Court.

Section 10 of that Act, as well as the same section in the 1947 amendments, limits the right of court review of an order of the Board to action initiated either by the Board or the employer. In fact, Section 9 of the 1935 Act stated that the power of the Board to prevent unfair labor practices is exclusive.

A federal district court does not have equity jurisdiction to enjoin the Board from holding a hearing upon a Board complaint against an employer charging him with an unfair labor practice. *Myers v. Bethlehem Shipbuilding Corporation,* 303 U. S. 41; *Newport News Shipbuilding Etc., Co. v. Schauffler,* 303 U. S. 54.

Nor is a labor organization entitled to review in the courts of a certification by the Board of a bargaining agency. *American Federation of Labor v. National Labor Relations Board,* 308 U. S. 401; *National Labor Relations Board v. International Brotherhood of Electrical Workers,* 308 U. S. 413.

**(3) The Federal Constitution does not give employees the right to organize and to select representatives for collective bargaining.**

The Constitution of the United States contains no provision giving employees the right to organize and to select representatives for collective bargaining or other mutual aid or protection.

True, the First Amendment does provide in part that "Congress shall make no law * * * abridging the freedom of speech or of the press; or the right of people peaceably to assemble * * *." But the most that can be said is that this amendment only provides certain protections to employees in organizing and in selecting their representatives.

The right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection is "a fundamental right." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33; *Amalgamated Utility Workers v. Consolidated Edison Co. of New York*, 309 U. S. 261, 263. "The history of the Act and its language show that its ruling purpose was to protect interstate commerce by securing to employees *the rights established by Section 7* to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes." (Emphasis supplied herein unless otherwise indicated.) *National Labor Relations Board v. Pa. Greyhound Lines, Inc.*, 303 U. S. 261, 265.

On the other hand, the Federal Constitution expressly gives to Congress power to regulate commerce with foreign nations, among the states, and with the Indian tribes (Article I, Section 8). This Court has held, as

has just been shown, that it is under this power that Congress acted in enacting the National Labor Relations Act of 1935. The same must be true of the amendments to that Act enacted in 1947.

So that the lower court in upholding the constitutionality of Sections 2 (3), 2 (11) and 14 (a) but followed those decisions.

**(4) The right to organize and to select representatives is not disturbed by the 1947 Act.**

The lower court properly held that the rights of employees to self-organization and to select representatives of their own choosing is not disturbed by the 1947 Act. The Act does not state that supervisors must not exercise such rights. In fact, Section 14 (a) expressly says that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization."

As the Board said in its brief on remand (p. 17),

> "There is nothing in the amended Act which restricts the right of supervisors to express opinions, and Section 14 (a) specifically reserves to them the right to form and join labor organizations. Accordingly, we see no basis for the contention * * * that the rights guaranteed to the members of the Association by the First Amendment have in any way been prejudiced."

**(5) The Federal Constitution does not require an employer to bargain collectively with his employees.**

Nor did the lower court depart from decisions of this Court in concluding that the Federal Constitution does not require an employer to bargain collectively with his employees.

It is the National Labor Relations Act which "makes it the employer's duty to bargain with his employees." *National Labor Relations Board v. Columbia Enameling & Stamping Co.*, 306 U. S. 292, 297; *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U. S. 678, 683.

Again borrowing from the Board's brief on remand (p. 17),

> "Intervenor's contention that these rights are infringed rests on the premise that the First Amendment guarantees of free speech, press and assembly encompass the right of employees to be affirmatively protected in their organizational activity against employer interference and to select, and be represented by, an exclusive bargaining agent. In other words, Intervenor assumes that employees and labor organizations are entitled to the protection afforded by the National Labor Relations Act as a matter of constitutional right. An analysis of the rights of employees prior to the Act and of the nature of the rights created thereby conclusively demonstrates that Intervenor's fundamental assumption is erroneous."

In a note to the foregoing (p. 17), the Board points out that

> "The Association made the same contention before the Supreme Court, in connection with the Association's petition for certiorari in the *Young* case

> and the Board there answered it in the same manner as it is here doing. Memorandum for the N. L. R. B., pp. 10-11, *Foreman's Association of America v. L. A. Young Spring & Wire Corp. and N. L. R. B.*, No. 502, in the Supreme Court of the United States, October Term, 1947. As indicated, *supra*, note 3, the Supreme Court denied the Association's petition." (333 U. S. 837.)

The Board properly then continued in its brief (p. 18) by pointing out that prior to 1935, the right of employees to form labor organizations, etc., "was protected only against governmental infringement. It was well established that no provision of the Federal Constitution and federal law prevented employers generally from discharging employees for exercising these rights or from refusing to recognize or bargain with labor organizations. Thus when Congress, by enacting the National Labor Relations Act, imposed on employers the duty to refrain from interference and discrimination in matters of organization and to bargain collectively with duly designated bargaining representatives, it created rights against employers which did not theretofore exist." *National Maritime Union of America v. Herzog*, 78 F. Supp. 146, D. C., D. C. "At the same time, however, Congress did not vest in employees or in labor organizations a right to compel employers to comply with these newly created obligations. It created 'public,' not 'private' rights and vested the power to vindicate them solely in the Board. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 265; *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 362-363; *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 192-193."

From the foregoing, the Board concluded in its brief (p. 19) that:

"In the light of this background, it is obvious that neither employees nor labor organizations have 'a constitutional right to the advantage offered by the Act.' *National Maritime Union v. Herzog,*" 78 F. Supp. 146, D. C., D. C. "Indeed, since Congress, in enacting the National Labor Relations Act, chose to effectuate its policies by creating public rather than private rights, the withdrawal of the protection of the Act would not even infringe upon any pre-existing private or personal right of employees or labor organizations. Accordingly, Intervenor's assumption that the First Amendment guarantees encompass the benefits accorded by the Act is completely unjustified. Since its contention that the exclusion of supervisors under the amended Act contravenes the First Amendment rests solely upon this erroneous premise, it follows that such contention is also without merit."

**(6) The Railway Labor Act cases relied on by the Association are not in point.**

The lower court was right in refusing to give to the case of *Texas & N. O. R. Co. v. Brotherhood,* 281 U. S. 548, the effect urged by the Association in its brief (p. 10). The case is not in point. It involves the Railway Labor Act of 1926 (44 Stat. 577, 45 U. S. C. 151). That statute not only establishes certain rights of employees of carriers but *imposes certain duties upon carriers in respect to those rights.* It provides (Section 152) that *"It shall be the duty of all carriers * * * to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions,"* and that "Employees shall have the right to organize and bargain collectively through representatives of their own choosing." This Court held that although the Act contained no penalty for its violation by a carrier, rights and duties were created in the statute, and the conclu-

sion must be that enforcement was contemplated. "The right is created and the remedy exists" (pp 569, 570). In other words, there was a statutory right and the court enforced it.

The right to require employers generally to bargain collectively with supervisors, we repeat, has never existed aside from the 1935 National Labor Relations Act, and the portion of that Act so requiring is no longer in effect.

For the same reason as that which we have advanced in respect to the *Texas & N. O. R. Co.* case, the lower court did not conceive that *Virginian Ry. Co. v. System Federation No. 40,* 300 U. S. 515, was in point.

Parenthetically, "It is quite apparent that not every person in the service of a carrier, though subject to its continuing control and authority, is an 'employee'; but only those who perform work defined as that of an employee by existing or amended orders of the Interstate Commerce Commission," said the Court in *National Council v. Sealy,* 5th Cir., 152 F. 2d 500, basing its assertion upon the Railway Labor Act's definition of "employee" (45 U. S. C., Section 151).

Further, in respect to the *Texas* and the *Virginian Railway* cases, the petitioner says in its brief (pp. 11, 12):

> "• • • We do *not* urge that the protection afforded by the National Labor Relations Act is a constitutional right or that Congress may not withdraw the administrative and other remedies provided by that Act, or that the Act created vested rights of enforcement against employers, rather than public rights of enforcement, generally within the exclusive jurisdiction of the Board."

But, argues the petitioner, beginning at the foot of page 11 of its brief, the *Railway* cases hold that where there is

a right there must be a remedy, and to take away the right of supervisors to proceed under any applicable state statute is a denial of due process. Petitioner urges that the latter portion of Section 14 (a) of the 1947 Act deprives it of such right.

In answer, the lower court properly concluded, as we have heretofore stated, that nothing in the recently enacted federal statute deprives supervisors of their right to organize and their right to bargain collectively as those rights may be recognized in any statute.

Furthermore, as we have said, Section 14 (a) only spells out the 1935 Act as it was interpreted by this Court in *Bethlehem Steel Co. v. New York Labor Relations Board, supra,* 330 U. S. 767, that is, that Congress in enacting the 1935 Act usurped the field as to supervisors and that state boards, therefore, lacked jurisdiction to require employers under the federal statute to collectively bargain with their supervision.

It cannot be successfully claimed that Congress did not constitutionally set up a national policy when it provided in the 1935 Act that state statutes were not applicable to supervisors if their employers were covered by the Federal statute.

All that Congress did in the 1947 amendments, by the application of its power to regulate commerce, was to extend that national policy a step further by providing that such supervisors may not resort to the federal statute.

Of course "There is no constitutional right to have all general propositions of law once adopted remain unchanged." *Patterson v. Colorado,* 205 U. S. 454, 461.

Because of the foregoing, the first portion of petitioner's argument, which we have reviewed under head-

ing "A" hereof, does not bear out petitioner's claim that the lower court did not give proper effect to the decisions of this Court.

**B. The claim of the Association that Sections 2 (3), 2 (11) and 14 (a) of the Amended Act deny due process of law under the Fifth Amendment because "those sections are based upon an arbitrary classification which bears no reasonable relation to the purposes of the legislation" is without merit.**

Here, again, the lower court applied the law as announced in decisions of this Court.

**(1) Exclusions of employers and employees in the 1935 and 1947 Acts.**

The exclusion of supervisors from the coverage of the amended National Labor Relations Act is not the first instance of the exclusion of a classification of employees from that Act.

The Act as originally enacted provided that certain employers and certain employees were not subject to its terms.

What the 1947 amendments did was to continue those exclusions and to add to the exclusions certain other classes of employers and certain other classes of employees.

In the 1935 statute, the definition of "employer" (Section 2 (2)) expressly excluded (1) the United States, (2) the states and (3) political subdivision thereof, (4) persons subject to the Railway Labor Act, (5) labor organizations, other than when acting as employers, and (6) "anyone acting in the capacity of an officer or agent of such labor organization."

The 1947 Act (Section 2 (2)) added to the foregoing employer exclusions (1) wholly owned Government corporations, (2) Federal Reserve Banks, and (3) non-profit hospitals.

At to the term "employees," the definition of that term in the 1935 Act (Section 2 (3)) expressly excluded (1) individuals employed in agriculture, (2) persons in the domestic service of any family or person at his home, and (3) individuals employed by their parent or spouse.

The 1947 Act (Section 2 (3)) adds to these exclusions of "employees" (1) any individual having the statutes of an independent contractor, (2) supervisors, and (3) any individual employed "by any person who is not an employer as herein defined." In addition, it excludes individuals "employed in agriculture" as contrasted with "agricultural employees" as in the former Act.

Moreover, the 1935 Act treated professional employees and plant guards as it did other employees covered by the Act, while the 1947 amendments contain limitations as to both of these classes of employees. To be specific, Section 9 (b) of Section 101 of the 1947 Act provides "That the Board shall not (1) decide that any unit is appropriate for such purposes (collective bargaining) if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or * * * (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organiza-

tion admits to membership or is affiliated directly or indirectly with an organization which admits to membership employees other than guards." (The term "professional employee" is defined. Section 2 (12)).

All of which means that not only have certain employees and certain employers been omitted from the National Labor Relations Act since it was first enacted in 1935, but that the 1947 amendments removed the coverage of the Act from others than supervisors.

**(2) Circuit Court of Appeals' conclusion that exclusion of supervisors is not arbitrary is in accord with the holdings of this Court.**

In respect to the claim of the Association that the exclusion of supervisors in the 1947 Act is arbitrary, the Court of Appeals found against the Association. The Court, adopting the rulings of this Court, stated (p. 578) that it is "well recognized that Congress has broad discretion in making statutory classifications, that such a classification is not invalid if it bears a reasonable relation to the purposes of the legislation, that legislative classification is presumed to rest on a rational basis if there is any conceivable state of facts which would support it, and that the courts will not inquire into the necessity of such classification, if it is not patently irrational and unjustifiable," citing *McCulloch v. Maryland,* 4 Wheat. 316, 422; *Carmichael v. Southern Coal & Coke Company,* 301 U. S. 495, 509, 513; *Charles C. Stewart Machine Co. v. Davis,* 301 U. S. 548, 584, 585; *Helvering v. Davis,* 301 U. S. 619, 646. The Court continued by stating (p. 578) that there are numerous instances of valid Federal legislation which classify and exempt certain types of employees from the provisions of the legislation enacted. It pointed out that the 1935 National Labor

Relations Act exempted some classifications of labor, and gave rights to employees which it withheld from employers; and that the Fair Labor Standards Act (29 U. S. C., Sections 201, 213), the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C., 1947 Cum., Sections 901, 902), the Federal Insurance Contributions Act, (26 U. S. C., Sections 1400, 1426) and the Social Security Act (42 U. S. C., Sections 301, 409, 1107) as well exclude certain classifications of employees. The Court said (p. 578) that Congress gave careful consideration in enacting the 1947 Act to the proposal to exclude supervisory personnel, citing Report (No. 245) of the House Committee on Education and Labor on H. R. 3020; Report (No. 105) of the Senate Committee on Labor and Public Welfare on S. 1126; Cong. Rec. April 15, 1947, page 3533; April 23, 1947, page 3952; April 28, 1947, page 4260; May 1, 1947, page 4490; May 12, 1947, page 5146; June 6, 1947, page 6660, (hereinafter considered). The Court (p. 578) referred to the fact that Mr. Justice Douglas, in his dissenting opinion in *Packard Motor Car Co. v. National Labor Relations Board,* 330 U. S. 485, at page 496, said that "Trade union history shows that foremen were the arms and legs of management in executing labor policies. In industrial conflicts they were allied with management." The Court concluded (p. 578) that the action of Congress in treating supervisor's "as a part of management, was based upon substantial and real considerations, and was not an arbitrary or unjustifiable classification." It said (p. 578) that "The chief objection of the Foreman's Association to such a classification is that it deprives the supervisory employees of the protection given by the Act to other employees. But the Act also fails to give this protection to others who constitute a part of management. Whether it is desirable or undesirable, as a matter of policy, for foremen to organize and be classified as em-

ployees, is for Congress, not the Court to determine. *Packard Motor Car Company v. N. L. R. B., supra,* 330 U. S. at pages 490, 493."

**(a) Congressional history.**

The Congressional history referred to by the Court proves that Congress heard many witnesses and examined much documentary evidence, that it weighed the matter carefully, and that it did not act arbitrarily.

The report (No. 245) by the House Committee on Education and Labor on H. R. 3020 (the Labor Management Relations Bill, 1947) states in reference to "excluding foremen and other supervisory personnel from the definition of 'employee' ":

> "The evidence before the committee showed this to be one of the most important and most critical problems."

The report continues by saying that when Congress passed the original National Labor Relations Act the object was "to protect workers and their unions against foremen, not to unionize foremen." The history of the various positions taken by the Board as to foremen is covered. The following is then said:

> "The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but

> when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them. The evidence shows that rank and file unions have done much of the actual organizing of foremen, even when the foremen's union professes to be 'independent.' Without any question, this is why the unions seek to organize the foremen."

Experiences of employers as to supervision under the Act are narrated. The close tie-up of rank and file unions with the Foreman's Association of America is commented upon at length. "Supervisors are management people," the Report states. "Management, like labor, must have faithful agents."

The Committee concluded:

> "If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in war and our standard of living always, then *Congress must exclude foremen from the operation of the Labor Act, not only when they organize into unions of the rank and file nad into unions affiliated with those of the rank and file, but also when they organize into unions that claim to be independent of the unions of the rank and file.*"

The Report (No. 105) of the Senate Committee on Labor and Public Welfare on the bill (S. 1126) also shows that the Senate gave thorough consideration to the matter of excluding supervision from the coverage of the Act. The portion of the Report devoted to "supervisory personnel" begins:

> "A recent development which probably more than any other single factor has upset any real balance

> of power in the collective-bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise."

The report then reviews the difficulties certain employers had had because of the decision in the *Packard* case, *supra;* states that the definition of "supervisors" adopted by the Committee applies the test which the Board itself had set up in certain of its cases; and points out that any compromise under which supervisors would be protected by the Act if organized in strictly independent unions "would be completely unrealistic. There is nothing in the record developed before this committee to justify the conclusion that there is such a thing as a really independent foremen's organization"; and the Report refers to the testimony in that respect of the president of the Foreman's Association of America.

Congressional debates as well show that Congress carefully considered the matter of excluding supervisors from the coverage of the Act. For instance, the House Committee *"made the most exhaustive study and held the most exhaustive hearings"* (Cong. Rec., April 15, 1947, p. 3533). Senator Taft said (Cong. Rec., April 23, 1947, p. 3952) that the committee had "tried various in-between steps, but the general conclusion was that they (foremen) must either be a part of management or a part of the employees • • • we felt that on the questions of theory and of intention of the law, and on the considerations which I have submitted, foremen should be excluded from the operations of the National Labor Relations Act" (Cong. Rec., April 23, 1947, p. 3952). See as well Cong. Rec. April 15, 1947, p. 3556; Cong. Rec., April 28, 1947, p. 4260; Cong. Rec., May 1, 1947,

p. 4490; Cong. Rec., May 12, 1947, p. 5146; Cong. Rec., June 6, 1947, p. 6660.

The Report of the Joint Committee on Labor-Management Relations (Report No. 986, 80th Congress, 2d Session), which committee is provided for in Sections 401 through 407 of the Labor Management Relations Act, 1947, filed March 15, 1948, in discussing what has happened as the result of taking supervisors out from under the coverage of the National Labor Relations Act, concludes:

> "* * * Not only has the exclusion of supervisory employees from the benefits of the act failed to produce the work stoppages predicted by opponents of the provision, but it has served to promote the establishment by employers of plans creating many new benefits for supervisory employees."

The minority report of that same committee (Report No. 986, Part 2) does not take exception to the remark of the majority as to supervisors.

**(b) Exemptions in other Federal statutes held valid.**

The exemptions in the Fair Labor Standards Act, referred to above in the opinion of the lower court, were held not to violate the Fifth Amendment in *Mabee v. White Plains Publishing Company*, 327 U. S. 178, 184, where this Court said that "Congress may weigh relative needs and restrict the application of a legislative body to less than the entire field."

The same conclusion was reached by this Court in several cases involving the exemptions contained in the Social Security Act, which statute and its exemptions were also commented upon by the Court of Appeals, as above set forth. In *Carmichael v. Southern Coal & Coke Co., supra*, 301 U. S. 495, 509, this Court said that it is well

established that legislative classification "must be presumed to rest on (a rational) basis if there is any conceivable state of facts which would support it." In *Charles C. Steward Machine Co. v. Davis, supra,* 301 U. S. 548, 584, it was said that classifications and exemptions which have support in considerations of policy and practical convenience cannot be condemned as arbitrary. The latter case in so holding was cited with approval in *Helvering v. Davis, supra,* 301 U. S. 619, 646.

*McCulloch v. Maryland, supra,* 4 Wheat. 316, 422, is to the effect that courts will not inquire into the necessity for a classification if the classification is not "patently irrational and unjustifiable."

Mr. Justice Jackson, speaking for the majority of the Court in the *Packard* case, *supra,* 330 U. S. 485, 490, said that "it is for Congress, not for us, to create exceptions or qualifications at odds with (the Acts) plain terms."

**(c) Exclusions and "intra-state employers."**

The Foreman's Association, in its petition, page 21, dismisses the matter of the exclusion of certain employees from the National Labor Relations Act as enacted in 1935 by claiming that the exempted employees "were employed by intra-state employers." Counsel undoubtedly refers to the fact, as set forth on page 16 hereof, that the 1935 Act excludes from the definition of "employees" individuals employed in agriculture, persons in the domestic service of any family or person at his home, and individuals employed by their parent or spouse. But counsel has lost track of the fact that that Act as well excluded from the term "employer" the United States, the states and their political subdivisions, persons subject to the Railway Labor Act, labor organizations other than when acting as em-

ployers, and anyone acting in the capacity of an officer or agent of a labor organization (Section 2 (2)). The exclusion of the employer of course excludes the employees of such employer. As far as persons employed in agriculture are concerned, certain of them could have been placed under the Act on the basis of this Court's reasoning in *Wickard v. Filburn,* 317 U. S. 111, a case involving the exercise by Congress of its power under the commerce clause and involving the Agricultural Adjustment Act of 1938 (7 U. S. C., Sec. 1281).

Certainly the exclusions of the Longshoremen's and Harbor Workers' Compensation Act, heretofore referred to, cannot be brushed aside on the ground that those excluded are employees of "intra-state employers." That Act, enacted in 1927, provides (33 U. S. C., Section 902) that the term "employee" does not include "a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." The same is true of the Fair Labor Standards Act, referred to above, Section 213 thereof excluding all executive, administrative and professional employees, outside salesmen and many others not employees of "intra-state employers." The Social Security Act, also referred to above, as well excludes (Section 409) certain employees who are not employees of an "intra-state employer."

**(d) Truax v. Corrigan not in point.**

The lower court properly interpreted this Court's holding in *Truax v. Corrigan,* 257 U. S. 312, relied upon on page 23 of the Association's brief. All that case held was that a portion of a state statute was in violation of the equal protection clauses of the Fourteenth Amendment (p. 339), and that to give effect to a statute whereby serious losses, *inflicted by "unlawful means,"* are made remediless would

be to deprive the person suffering the loss of due process of law (p. 330).

**(c) N. L. R. A. created public and not private rights.**

The lower court applied the law of this Court in stating, pp. 577 and 579 of its opinion, that Congress, in enacting the National Labor Relations Act, created public and not private rights. *Amalgamated Utility Workers v. Consolidated Edison Company of New York,* 309 U. S. 261; *National Licorice Co. v. National Labor Relations Board,* 309 U. S. 350, 362, 363; *Phelps Dodge Corporation v. National Labor Relations Board,* 313 U. S. 177, 192, 193. To borrow the language of the Court of Appeals (p. 579), there is no vested right in individuals to have the rules of law remain unchanged for their benefit. *Middleton v. Texas Power & Light Co.,* 249 U. S. 152, 163; *New York Central R. Co. v. White,* 243 U. S. 188, 198. A proceeding by the Board is in the public interest, and is remedial and preventative, rather than punitive in nature. *National Labor Relations Board v. Thompson Products, Inc.,* 6 Cir., 130 F. 2d 363, 367.

In conclusion on this phase of the Association's argument, we state, as did the Board in its brief on remand (p. 21), that "We submit that it can hardly be contended that Congress was 'patently irrational and unjustified' in concluding that the 'real balance of power in the collective-bargaining process' might be upset if labor organizations were permitted to continue invoking the Act 'for covering supervisory personnel, traditionally regarded as part of management.' S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 304."

### C. Paragraphs 1 (a) and (b) of the Board's Order

The lower court, having found the sections in question of the 1947 Act constitutional, applied the ruling of this Court in holding that the two paragraphs of the Board's cease and desist order (R. 55) should not be enforced due to the fact that they operate *in futuro*.

The Association contended before this Court, in connection with the Association's petition for certiorari in the *Young* case, that even though supervisors were no longer within the scope of the National Labor Relations Act, nevertheless a cease and desist order of the Board, entered prior to the 1947 amendments becoming effective, should be enforced (No. 502, October Term, 1947). The Court of Appeals, District of Columbia, had held to the contrary. *L. A. Young Spring & Wire Corp. v. National Labor Relations Board,* 163 F. 2d 905. This Court denied certiorari. 333 U. S. 837.

For the foregoing reasons, the Company submits that the lower court held, in accord with decisions of this Court, that the sections of the 1947 Act in question are not based on an arbitrary classification.

## II.

### THE DECISION BELOW DOES NOT INVOLVES A QUESTION OF GENERAL IMPORTANCE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The rule of this Court is that the issuance of writs of certiorari are sparingly exercised. *Forsyth v. Hammond,* 166 U. S. 506, 514; *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.,* 240 U. S. 251, 258.

Such being true, and considering the fact that the court below followed the decisions of this Court, the fact that

the claims of the petitioner have no merit as appears from the opinion of the court below and from this brief, and the fact that the National Labor Relations Board contested petitioner's claims below, it would seem that no question of general importance, which has not been settled by this Court, is involved and that the petition should be denied.

## III.

### CONCLUSION

Because of all the foregoing, the Company urges that the petition be denied.

Respectfully submitted,

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